The UN Security Council and Transitional Justice: Colombia

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The situation in Colombia presents a recent process with important, but preliminary, lessons regarding the potential impact of Security Council action (and inaction) on transitional justice on the ground. This support was seen as crucial for defending one of the four pillars of the transitional justice approach – the Special Jurisdiction for Peace (Jurisdicción Especial para la Paz, or JEP) – at a moment when it was under significant domestic attack. The Council’s ability to provide such support, during a critical period in the implementation of Colombia’s peace accord, rested on a number of factors, each of which will be explored in the study.

One can think of the Security Council’s involvement in Colombia in three distinct phases: the pre-agreement phase, when the Council was absent from the process; the immediate, post-agreement start-up phase; and the roll-out phase. These three phases provide useful illustrations of when and under what conditions the Council can help bolster the Colombian-led comprehensive approach to transitional justice. Taking these three phases into consideration, a number of important lessons emerge.

First, this paper explores the benefits of adopting a holistic approach to a peace agreement and its comprehensive transitional justice provisions. While the Security Council could have decided to interpret its mandate very narrowly, instead its members chose to comment on implementation of the agreement as a whole. Moreover, many UN Member States have come to understand the Accord’s comprehensive approach to truth, justice, reparations and non-repetition as the lynchpin of the project as a whole, which reinforces the need to maintain a holistic approach to the agreement’s implementation. Up to the time of writing, the parties have not seen this as the Council overstepping. If anything, one expert tracking this case noted that this approach is in the Government’s interest as it believes Security Council scrutiny holds the FARC ex-combatants more accountable. But if this were to change in the future, either side could challenge the Council as having an overly broad interpretation of its role, an accusation that would also transfer to the mission and its leadership.

Second, this case helps demonstrate the role the Security Council can play as a “protector of existing peace agreements,” especially when political turnover puts an existing accord under threat. In this case, the Council had to strike a delicate balance between protecting an agreement and respecting Colombia’s sovereignty. It managed to achieve this balance through its vocal, consistent but measured support for the JEP during a crucial period when it was under attack. The Security Council’s success in this case, however, was contingent on two key factors: The Government in question had a strong desire, despite its objections to the original transitional justice provisions in the peace accord, to remain fully engaged with the international community and to maintain its reputation for cooperation with international law and the UN. In addition, at the time of its intervention, the Security Council was perceived in Colombia as an impartial player.

Third, and unsurprisingly, Security Council unity enabled a consistent and coherent approach. Moreover, this case demonstrates the benefits of an almost unanimous international investment in the success of a particular peace process – or, to quote one Security Council member, “No one wants to see Colombia fail...or to be responsible for it failing.” While unified and active international investment in Colombia’s success may make this case fairly unique, it...
also introduces new risks to the process: the ‘fog of presumed success’ can occasionally blind international actors, including Council members, to shortcomings in the transitional justice implementation process.

Fourth and finally, the Colombia case helpfully demonstrates the benefits of a strategic and coordinated use of different actors to deliver messages on transitional justice. Some messages the Council can relay more easily than the mission, the UN’s Office of the High Commissioner for Human Rights (OHCHR) or the UN Country Team (UNCT). But other messages cannot be brought by the Council, given its make-up and the fact that it is, primarily, a political body. As a result, there is a need for different actors to push the same message in different ways. This study helps demonstrate the importance of coordinated messaging on transitional justice issues and of only relying on the Council to deliver messages when it holds the comparative advantage.
Phase I

Between 2012 and 2016, the Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo (FARC-EP) held formal direct talks in Cuba, to establish the terms of a final peace accord. This process, which came to be known as the “Havana Process,” followed over fifty years of fighting between Colombia’s largest guerilla group and the Government – a conflict that resulted in over 250,000 casualties, tens of thousands of people missing and millions displaced. The last three major attempts to end the conflict had failed. Thus, expectations were modest given that previous failed attempts are more likely to negatively affect efforts to broker a deal.

During the negotiations, the parties purposefully kept UN Headquarters outside of the formal process, with the exception of a late-stage request for a representative of the Secretary-General to accompany one of the six technical subcommissions responsible for providing expert advice to the principal negotiating parties. The parties each had reasons to be wary of UN involvement, given previous experiences with the international body. These experiences had led them to agree that the Havana Process, unlike previous Colombian processes, would have no international mediator. Rather, it was to be negotiated “by Colombians and for Colombians.”

The International Criminal Court (ICC), civil society, the UN Country Team (UNCT) and a key group of national and international experts known as the “New York Group,” however, were present during this first, pre-agreement stage. They each contributed to shaping what became the transitional justice approach of the draft agreement, based on deliberations of the subcommission on legal affairs. The “New York Group,” through soliciting international expertise,
helped convince the leadership of the FARC-EP that blanket amnesties were off the table, as this approach would violate both international and Colombian law. Civil society groups and the UNCT were instrumental in advocating and arranging the visit of conflict victims to the talks in Havana. Their direct participation is credited with shifting the parties’ – particularly the FARC’s – approach to transitional justice; after bearing witness to the victims’ testimonies, the FARC began to take their concerns more seriously and to put the restoration and future protection of their rights at the centre of the agreement. The ICC, through the visits of its Deputy Prosecutor to Colombia, played an important role in helping convince the army to allow itself to be considered under the same transitional justice provisions as the guerillas. According to one internal observer, the ICC “was always in the background” during the talks, helped by the fact that the situation was already on the Prosecutor’s pre-investigation list and that Colombia was a party to the Rome Statute. According to internal observers, the ICC Deputy Prosecutor made it clear to the army that “Colombia can negotiate its own solution [to address the most serious crimes], but the ICC would always monitor if [Colombia’s solution] is enough…” Following these interventions, “The [army] started to understand that they could be left out of the agreement. But if they were left out, they would be left to ordinary justice (which would never happen), and they, therefore, would be looked after by the ICC.” This external pressure, combined with a confidential dialogue between the army leadership and international experts, is credited with nudging the army towards accepting to be treated under the same truth and justice mechanisms as the FARC-EP.

Phase II

To the surprise of many within Colombia and within the international community, a final peace agreement was signed in September 2016 (and confirmed, in a modified form, in November 2016). The agreement spelled out both a comprehensive approach to transitional justice and a specific, albeit limited, role for the UN. Secretary-General Ban Ki-moon attended the
The transitional justice elements of the Accord were described in Chapter 5 of the agreement. In brief, they included provisions requiring that those responsible for the most serious crimes would be tried through the JEP. Otherwise, there would be the “widest possible” amnesties and limited sanctions for other politically-motivated crimes. In addition, the agreement called for a truth commission and a search unit for the disappeared. Lastly, the Chapter foresaw reparations for victims of the conflict as well as structural changes, including land reform, that would contribute towards the goal of non-recurrence.

It is important to note that the UN was broadly supportive of these provisions, with OHCHR confirming that Chapter 5, as written, generally conformed to international standards. In the final peace agreement, the negotiating parties requested that the UN, through OHCHR, provide “partnership on the implementation of Chapter 5 of the peace agreement on the rights of victims.” The Accord also called on the UN to assist in the monitoring and verification of the ceasefire as part of a trilateral mechanism and the verification of disarmament. Subsequently, the UN mandate was updated to include the reintegration and protection of ex-combatants. This assistance was requested in the form of a UN special political mission.

While there was initially much reticence amongst the parties to base such assistance on a Security Council mandate, a coalition within the Colombian Government, led by the High Commissioner for Peace, Sergio Jaramillo, succeeded in convincing the sceptics to consider a Security Council – rather than a General Assembly (or even a non-UN, regional body) mandate – as some had preferred. The FARC-EP leadership initially favored a Community of Latin American and Caribbean States (CELAC) mandate. The Colombian army leadership, in contrast, desired a hand-picked coalition of friendly States. The army was particularly opposed to the idea of inviting UN blue helmets on Colombia’s soil, which some saw as a measure “only used in failed States,” rather than in a middle income country with a professional army. Eventually, Jaramillo and his coalition were able to convince sceptics in the Government that UN technical expertise and existing structures would be an asset to the process. In addition, the UN Department of Political and Peacebuilding Affairs (DPPA), through the efforts of Jean Arnault and other senior UN officials, convinced the parties that only a Security Council mandate, rather than a General Assembly mandate, would enable the UN to provide the parties with the security monitoring and verification assistance they had requested.

This agreement, however, came with certain conditions. First, the parties insisted that the UN monitors be unarmed, out of uniform, and hail from countries in the region. Second, the parties insisted that the Security Council mission would not have an acronym – as this common practice was associated with an extended UN presence. And the parties, particularly Colombia’s President Juan Manuel Santos, envisioned only a brief UN presence with a light footprint. Third, Santos is reported to have contacted each of the Permanent Five members of the Security Council, declaring that if they were to pursue a Council mandate, “nothing is going to be in the mandate that we have not approved.” After picking the UK as the penholder, Santos declared that everything in the future mission’s mandate would be pre-arranged, to preclude intra-Council debate on the future resolution.

Accepting these unique conditions, the Security Council unanimously adopted the resolution establishing the “Mission in Colombia” on 25 January 2016. Composed of unarmed and ununiformed monitors from the region, the mission was charged with monitoring and verifying the laying down of arms and, as part of a tripartite mechanism, a definitive bilateral ceasefire and cessation of hostilities following the signing of the peace accord.

Following the mission’s first 12 months, and the conclusion of the formal peace agreement, the parties saw a need to adjust the Security Council mandate, which in turn led to the establishment
of a second UN mission under Resolution 2366. This second mission was based on a slightly expanded Council mandate, which included accompanying the parties and verifying their commitments regarding points 3.2 and 3.4 of the Final Peace Accord “on the reintegration of former FARC-EP members, and the implementation of measures of protection and security for former FARC-EP members and communities in territories most affected by the conflict.”

Phase III

In June 2018, President Santos, who led Colombia through the peace process and signed his name on the final Accord with FARC-EP’s leader, Timochenko, ended his second mandate. A conservative candidate, Iván Duque, was elected President, following a divisive and prolonged campaign. Duque had run on a promise to modify the Accord, especially its transitional justice elements, which were particularly unpopular amongst conservative sectors of the population. These constituents had disagreed with the modified amnesty provisions afforded to certain members of the FARC. His election introduced uncertainty around the implementation of the peace process, particularly legal guarantees for the FARC-EP members.

In March 2019, to demonstrate his resolve on these issues to this critical base, Duque vetoed a law governing the JEP, presenting various objections including a suggestion that lawmakers revise the approach of prosecuting only those most responsible for international crimes. His attempts to modify the Accord were timed with the initiation of the JEP’s operations, which had taken just over two years to get off the ground.

Duque’s announcement introduced fear among FARC-EP members regarding their legal guarantees, which in turn threatened to undermine the peace process. One reporter observed that “caught in the middle of political partisanship and court challenges,” the JEP was finding it difficult by summer 2019 to show “results in its mission to investigate and prosecute the perpetrators of war crimes committed during the country’s 52-year armed conflict.”

Ultimately, in June 2019, Duque signed the bill governing the JEP after Congress rejected his suggestions and the Constitutional Court upheld Congress’s rejection.

The following two sections will examine the Council’s specific approach to the transitional justice issue over these three phases, and the third section will highlight the impact of this approach in Colombia on events that transpired in 2019.
Overview of the Security Council’s Approach and Actions

It is important to begin by highlighting that Security Council members have been generally united in their approach to Colombia. This approach has four primary elements. First, the Council accepts that the process is Colombian-led and that its role is a minor one compared to other situations on its agenda. Second, despite having a minor role, the Council's members are pursuing a holistic approach to the agreement when supporting parties’ efforts at implementation. Third, the Council agrees that both they and the wider international community have much invested in the process as a whole going well. And finally, where possible, in order to maintain Council unity, the members look to separate their consideration of the situation in Colombia from consideration of other more controversial regional issues (such as the situation in Venezuela), which might in turn trigger unhelpful issue linkages with the peace process in Colombia.

As one Council member noted, “The relationship that the Council has with Colombia is one of the most positive of any that it has with those on its agenda.” This was attributed, in part to the “very open relationship the UK has with the [Government], as a penholder, and between [Colombia] and the rest of the Council.” It was also attributed to the vested interests of Council members in maintaining Colombia as one their current “success stories”, as well as the Colombian
Government’s own vested interest in maintaining its reputation in the larger community – a reputation that was recently bolstered through the agreement’s successful conclusion, the awarding of the Nobel Peace Prize, growing international investment and the country’s entry into the Organisation for Economic Cooperation and Development. What is most important to highlight is that this good relationship persisted following the 2018 change in administration.

The four elements of the Council’s approach to Colombia are perhaps best illustrated through three phases of involvement: pre-2016, 2016-2019 and 2019-the time of writing. Before 2016, during Phase I, the Security Council was absent from deliberations around the peace agreement. The insertion of Chapter 5 and the Accord’s overarching focus on non-repetition benefited instead from the parties’ consultations with a broader international coalition of actors including the “New York Group,” the ICC and the UNCT, as discussed in the previous section. In 2015, however, in the penultimate year of negotiations, the UN was asked to accompany the subcommission on “end of conflict” issues. The Secretary-General appointed Jean Arnault, a veteran of peace processes in Guatemala and Afghanistan, among other places, to lead this UN role. Arnault was later to become the head of the UN Mission in Colombia.

In January 2016, at the start of Phase II of the Council’s involvement, the Government of Colombia and FARC leaders issued joint letters to the Secretary-General (following a practice used in the context of Nepal), requesting that the Security Council establish a special political mission in Colombia. Nine months later, Santos delivered a copy of the peace agreement to the Security Council, affording it, some have argued, a type of international custodian status vis-à-vis the domestic agreement. The Council’s subsequent resolutions, in turn, “welcom[e]d” the peace agreement, commending the negotiating parties and “underlin[ing the Council’s] full commitment to” the peace process.

Santos’ act and these statements provided an important signal to would-be-spoilers that the international community broadly supported the Accord, including its most controversial chapter on transitional justice. In other words, while parties in Colombia were setting up the architecture to enable the implementation of commitments under the Accord, the Council saw its role as protecting the integrity of the peace deal as a whole, despite the fact that its mission was only charged with monitoring compliance with one of its parts.

During this startup phase, DPPA as well as mission leadership chose to follow a similarly holistic approach in their reporting to the Security Council. Although the mission’s mandate does not explicitly cover transitional justice, DPPA used reports of the Secretary-General to update Council members on progress towards truth, justice, reparations and non-repetition benchmarks laid out in the accord. For example, one Secretary-General report recounted that: “Victims are participating more and more actively in the transitional justice mechanisms and continue to be powerful voices in the search for truth, justice and reconciliation.” This inclusion of transitional justice was deliberate, intended to convey that even though the mandate of the mission was not to verify Chapter 5 of the Accord, that there was a need to understand the agreement as a comprehensive package of mutually reinforcing commitments.

Phase III of the Council’s involvement on transitional justice issues in Colombia aligns with the period when the transitional justice elements of the Accord came under substantial threat. 2019 was a period when Council members’ resolve to take risks for the sake of protecting the agreement was put to the test. During the polarized debate of early 2019 over the JEP, amidst Duque’s March 2019 veto described above, the Security Council, based on reports of the Secretary-General and briefings of the Secretariat, came out strongly in favour of the autonomy and independence of the JEP. The Council was careful not to challenge the Government’s right to object to the proposed bill, but it effectively conveyed the message that the issue needed to be addressed in a way that guaranteed the JEP’s independence, in line with the peace agreement and with principles enshrined in Colombia’s own laws.
During this third phase, the Security Council's meetings offered opportunities for Member States to express their support for the JEP, call for increasing its capacity and independence, and share their concern with the new Colombian authorities about the risks of introducing legal uncertainty into the peace process. Germany, for instance, contended that: “the legal uncertainty of combatants and former combatants is an issue which, if allowed to persist, will be detrimental to the consolidation of the peace process. I would therefore encourage Colombia to increase the capacity of the Special Jurisdiction for Peace.” France, in turn, conveyed that: “I believe it important to stress that the new Colombian authorities… continue to preserve the independence of the Special Jurisdiction for Peace and to do their utmost to bolster the system of justice, truth, reparation and non-repetition.”

Moreover, the Council also made good use of press statements to express support for the JEP during this time. For example, one statement read: “members of the Security Council reiterated the need for full respect for the independence and autonomy of the Special Jurisdiction for Peace, and underlined the importance of political and practical support in order for it to achieve its objective of guaranteeing the rights of victims.” They also expressed their support for the “Commission on Truth, Co-Existence, and Non-Repetition, whose role is essential for the establishment of truth and reconciliation.”

Further, the Council visited Colombia in July 2019, soon after the issue about the law had been settled. The Council insisted on meeting with the three heads of the transitional justice institutions — the Head of the Truth and Reconciliation Commission (TRC), the JEP and the Unit for the Disappeared. These meetings appeared on the Council's public agenda, explicitly signaling the importance the Council was placing on these institutions’ ability to continue to work autonomously.

It is important to reiterate, however, the unique investment of the Council in the success of Colombia’s Accord, which prompted it to take such a consistent and united stance during this third phase. Interviewees agreed that there is more at stake for the Council in Colombia than in many other situations on its agenda. The Colombian Accord sets new records, not only in terms of its focus on a comprehensive transitional justice approach but also in terms of its incorporation of gender, human rights, and structural considerations. In supporting the continued integrity of this Accord, and its implementation in its current form, certain Council members are also defending their own principles, more broadly, as expressed in this groundbreaking agreement. To quote one member: “for many countries it is important to defend this peace agreement in order to defend the issues that are at stake in this peace agreement.”
Phase I: Knowing When to Hold Back

As described earlier in the text, difficult past experiences engaging the UN as a facilitator had taught parties in Colombia that they were better off negotiating directly with each other. Even so, during the years of formal talks in Havana, it may have been tempting for DPPA or the Secretary-General to push for a more active UN political role, given the organization’s expertise and existing operational capacity. But DPPA and the Secretary-General purposefully held back, recognizing that the surest way to re-establish parties’ trust and to keep the door open for possible future UN involvement, during the post-agreement phase, was to curb their enthusiasm. The impact of this decision seems to be that it enabled the pro-UN coalition, within the Government’s camp (which, of the two conflict parties, was more sceptical of a UN role), the space to convince their counterparts that a third party would be needed to help monitor and verify the security elements of any future agreement and that the UN was better placed to do this than the alternatives explored. Even then, it was not a foregone conclusion that by inviting the UN, the parties would invite the Security Council, rather than the General Assembly, to act. Rather, the parties had to be persuaded of the logistical hurdles to a General Assembly, rather than a Security Council-mandated, mission.

Phase II: Taking a Holistic Approach

As discussed in the previous section, both the Security Council and the mission have taken a holistic approach to the situation in Colombia. The impact of this decision has been threefold: by adopting this approach from the beginning...
of their involvement and, especially during the roll-out phase, both have managed to give airtime to issues that would have otherwise lacked broad scrutiny. As a result, the parties have felt obliged to account for their progress (or lack of progress) in all, rather than only some, areas. In addition, adopting this holistic approach from the start has helped safeguard the space for future holistic reporting, even as the political climate changes. Finally, through their holistic approach, both the Council and the mission have helped bolster the narrative, common to transitional justice experts and those supporting the peace deal, that the Accord is a comprehensive and integrated approach to peace.\textsuperscript{57} Following this logic implies that success on any one of the six chapters is connected to success on the others. Similarly, neglect of any one element, such as transitional justice, may preclude success in the other realms, such as demobilization and reintegration.

It is unlikely, however, that the Council would have been successful in its efforts to adopt a holistic approach if it had not also carefully picked its battles. As will be discussed later, the Council has been criticized for not more actively highlighting shortcomings in the parties’ implementation of Chapter 5. In contrast, members of the Council have argued that their success lies in maintaining their good relationship with the Government, while also nudging key actors in areas that are most under threat. More frank and frequent reporting, in fact, should be undertaken by OHCHR, to discrete conversations with the Special Representative of the Secretary-General (SRSG) or to bilateral meetings between the Government and influential Member States.

Phase III: Support for JEP in 2019

The Security Council’s support for the JEP at a time when it was under heavy attack domestically appears to have been important. The Council sent a clear political message that was heard by all parties in Colombia, and which supporters of the agreement could hold up as validating their position. According to one individual closely involved in the peace process: “Without the Security Council pronouncing itself so regularly on [the need to protect the JEP] and in such a black and white manner, we would not be in this situation now.” The interviewee went further to explain: “In a context where the [Duque] Government tried everything to cut [the Accord] down, the Security Council was the crucial actor that forced the Government to continue on that [path]...[and] could not go further in this will to dismantle the peace agreement.”\textsuperscript{58}

Other actors built off of the Council’s initial stance, amplifying its effects. For example, pro-peace agreement figures (including Sergio Jaramillo and Humberto de la Calle) and activists conveyed a letter to the Secretary-General pointing to the Council’s reiteration of the need to support the JEP’s independence and autonomy, and calling on the mission to take account of threats to the JEP in its next report to Security Council.\textsuperscript{59} Further, a cross-party group of legislators from the UK and Ireland wrote a letter to President Duque, stating: “We recognize that the United Nations Security Council and the Prosecutor of the International Criminal Court both recognize the central position of victims in the implementation of the Peace Agreement.” Both reiterated the need to fully respect the Special Jurisdiction for Peace’s independence and autonomy.\textsuperscript{60} Such a statement would have borne far less weight if it were not based on the Council’s pre-existing position.

The Council’s support also buttressed the statement by the UN Mission in Colombia in support of the JEP, issued on 11 March 2019:

\textbf{It is regrettable that, more than two years after the signing of the Final Agreement, the JEP still does not have a Statutory Law, a solid legal framework that guarantees its operation in full exercise of autonomy and independence, key principles that the UN, through the Security Council [emphasis added], has repeatedly indicated as indispensable. We fully expect that the JEP will receive, from all the country’s authorities, the political and practical support for its functioning. This support will determine, to a large extent, whether victims’ rights are placed at the centre of peacebuilding.}\textsuperscript{61}
This convergence of international support, which built upon the Security Council’s words, strengthened national actors’ efforts to protect the JEP. In the end, the issue was settled in Colombia by the Constitutional Court. While it is difficult to know whether the Court took into account what the Security Council was saying, most observers would agree that the Council had some impact in sending a signal that there was serious international concern about moves against the transitional justice system.

A precondition for such impact, however, is a Government that feels pressure to “shine at the international level,” as one observer put it, and to “avoid being attacked.” The Government’s narrative of an ever-stronger Colombia shows a path towards further integration with and reliance on maintaining strong multilateral relationships. On a parallel front, the current Government feels the weight of the legacy of its predecessors, who negotiated the agreement and were honored with the Nobel Peace Prize. Duque is well aware of the degree of international attention and support directed at the peace agreement. As a result, so long as the Government feels scrutinized by a body with the ability to challenge either these multilateral relationships or this legacy, interviewees assessed that it will continue to be “prudent in analysing how far it can go” in efforts to challenge Chapter 5 provisions. It also helps that, currently, the Duque Government perceives Security Council scrutiny on compliance with Chapter 5 as working to its advantage if it serves to increase FARC ex-combatants compliance with the Truth Commission.

At the time of the research conducted for this paper, the immediate threat to the JEP has decreased, and the Government was not trying to proactively rewrite parts of the agreement. But there are still occasional efforts in Congress by legislators from the governing party to introduce legislation that could affect the terms of the transitional justice process. Moreover, the international fora, such as the “Group of 24” previously used by the Government to keep the international community in Colombia informed regarding peace process developments, has ceased to meet. It is possible that Colombia will see more polarization around transitional justice in the near future, for example, when the JEP begins issuing sentences, and there will be a need again for the Security Council to lend its vocal support to transitional justice institutions.

**Broader Support to Chapter 5 Provisions (beyond the JEP)**

The Council’s support to transitional justice provisions beyond the JEP has been much more limited. This may, in part, reflect the severity of the threat posed. While each of the Chapter 5 institutions have come under attack, the efforts to compromise the independence and autonomy of the criminal justice mechanism were most severe. More, however, may be needed in this space. If the Council is to continue to protect the 2016 Peace Accord in a holistic manner, this may be one area where it could focus attention in the future.

The Security Council took an important step in this direction. Under Belgium’s February 2020 Presidency on the Council, the Head of the Truth and Reconciliation Commission, Father Francisco de Roux, was invited to brief the Council as part of an Open Debate on Transitional Justice. However, such briefings are still the exception, compared to related areas such as Rule of Law or Disarmament, Demobilization and Reintegration (DDR). Thus, further consideration is needed on whether or not the Council is the most effective body, when compared to, for example, OHCHR or a third, non-UN entity, for supporting efforts to ensure that non-judicial elements in Chapter 5 are also fulfilled.

**A Cautionary Note: Coordinating a Coherent, System-Wide Approach to Transitional Justice in Colombia**

As discussed at the beginning of this paper, Colombia is a unique case in which there is general international unanimity in wishing to see the Accord and the ensuing peace transition succeed. Progress on transitional justice forms an
important part of this process. That said, some have argued that such a strong and generally unanimous desire for success – from the Council and amongst the bodies directly supporting it – has led to certain blindspots when it comes to challenges or gaps in implementation.

To more fully illustrate this point, consider the Secretary-General’s reports to the Security Council. They have provided crucial information for keeping the Council abreast of progress on the implementation of, and threats to, the Integrated System. These reports have acknowledged shortcomings in the implementation of the peace accord\textsuperscript{71} and brought to the attention of the Council important threats to its transitional justice elements.\textsuperscript{72} Nevertheless, some have critiqued these reports as being too “rosy,” portraying implementation as a “success” even when other parts of the UN system deemed that the transitional justice elements of the Accord were not being executed in a way that conformed with international standards.\textsuperscript{73}

Secretary-General reports to the Security Council generally highlight a more positive picture than OHCHR reports to the Human Rights Council. But one could also argue that this is to be expected given that these reports are directed at different audiences and meant to serve different purposes. For example, the High Commissioner for Human Rights briefed the Human Rights Council in March 2018, expressing deep concern for various aspects of the implementation of the transitional justice parts of the 2016 Accord and concluded that: “Congress did not implement the Integrated System [of Justice, Truth, Reparations and Guarantees of Non-repetition] as conceptualized and, thus far, implementation has not complied with international standards.”\textsuperscript{74} By contrast, the Secretary-General’s report to the UN Security Council around the same time applauds the “expeditious approval by Congress of the procedures of the Special Jurisdiction.”\textsuperscript{75} If coordinated and strategically used, this variation in messaging can work to the UN’s advantage. However, if uncoordinated, such seemingly contradictory statements may undermine the credibility and effectiveness of either one of these bodies.

For their own part, some Council members have countered that the language they chose to use in press statements on Colombia is carefully couched so as not to be too prescriptive. According to one, “there is a reason [a reference to transitional justice] comes at the end of the statement and is shorter than the other paragraphs.” Colombia has a long history of transitional justice initiatives at the national level, as well as a deep sense of pride in its own legal processes and systems.\textsuperscript{76} Given this context, it was reported that Council members felt that “it is enough to let [the parties] know we are keeping an eye on [Chapter 5] and to let transitional justice stakeholders know that we are keeping an eye on it – without having to enter into a discussion on it with them...”\textsuperscript{77} “We have to be careful,” another source added, “language that might look inane to the average person is seen as explosive to the Colombians...but calling for the ‘independence’ and ‘autonomy’ of a Colombian institution is feedback that is well received as these are principles already well embraced by many Colombian institutions.”\textsuperscript{78}

Those who spoke to the above point also emphasized the greater potential for the Council to play the role of “bad cop” than that of a Head of Mission or Resident Coordinator. The SRSG, for his part, can nudge the Government on issues such as the JEP both in public and behind closed doors. He can warn the Government that lack of progress “will not put them in the best light” in future reporting to the Council, but the SRSG is more limited in her or his ability to publicly critique a conflict party. The Council, in contrast, is a more effective form of public pressure, if used sparingly, as Colombian senior officials are particularly “reluctant to expose themselves to the scrutiny the Council brings.”\textsuperscript{79}

A Cautionary Note: The Impact of Engaging the Council on the Broader UN System

The establishment of a UN mission and the embedding of its mandate in a Security Council resolution shifts how the broader UNCT can engage with transitional justice issues within...
Colombia. On the one hand, the mission may provide existing UNCT initiatives with a louder microphone and an additional source of leverage vis-à-vis the Government or the other conflict parties. Some have observed, however, that the arrival of a large and well-resourced UN mission in this instance may have diminished OHCHR's profile in Colombia in particular at precisely the time the Office was being tasked by the negotiating parties with significant responsibilities in supporting the implementation of the Accord, especially Chapter 5. After the arrival of the mission, OHCHR reportedly experienced more difficult and distant relations with the Government, which preferred to deal with the mission directly. But this challenge would certainly not be unique to the mission in Colombia. In previous cases, such as the UN's work in Nepal, there was a concerted division of labour between the Security Council mandated special political mission, with its limited verification and monitoring mandate, and the OHCHR country mission, which tackled transitional justice issues more directly. So long as transitional justice issues remain the most sensitive ones for a host government, the UN actor most vocally pushing for progress on transitional justice may experience a strained relationship with government officials.

Others have observed that this particular challenge may have been overcome if the UN Mission in Colombia had been integrated rather than non-integrated. One representative from the mission interviewed for this study argued that an integrated mission “would have helped collaboration between the mission and OHCHR. Now this [collaboration] is left to what we manage to do at the regional level, because there are no guidelines or memorandums of understanding between us [the mission and OHCHR]. We are trying not to duplicate the work that OHCHR is doing, especially if you ask the same questions to social leaders.” An OHCHR official argued that in general coordination has not worked well and that frequently “you'd have a situation where you would show up to investigate the killing of a human rights defender, and they'd say why are you here? The UN was here yesterday.” Reportedly, coordination on the ground between the mission and OHCHR has noticeably improved as the leadership of both have actively sought to foster coordination on the transitional justice file.

While structure (i.e., an integrated versus a non-integrated mission) may have played a role in complicating coordination between OHCHR and the Security Council-mandated mission, it can also be overcome. For example, in Nepal, a non-integrated mission structured very similarly to that in Colombia proved unproblematic for OHCHR's work on human rights – and within that, transitional justice. In fact, OHCHR-Nepal's leadership reported finding this separation advantageous at times “as...it accorded the office more independence, while shielding its members from the political compromises that can arise in a political mission's work.” Thus, one cannot assume that an integrated mission would have solved the inter-entity hurdles faced in Colombia. That said, it is important to highlight that the staffing situation in Nepal was also quite unique: the first head of the UN mission, Ian Martin, had previously headed Nepal's OHCHR country mission, and thus was attuned to the office's work and ensured collaboration rather than competition. Thus, effective collaboration may depend on more than the structure. It may also ride on individual personalities, familiarity of the leaders with the mandate/working methods of the other entity and the willingness of both entities to coordinate their work, in spite of their separate structures.
IV

Key Takeaways

1 THE IMPORTANCE OF UNITY ON THE SECURITY COUNCIL AND A COLLECTIVE VESTED INTEREST IN SUCCESS

A unified Security Council is an essential precondition for effective action. Even more importantly, this case demonstrates the benefits of collective investment in the success of a particular case – or, to repeat the quote from one Council member: “No one wants to see [the Colombian peace process] fail...or to be responsible for it failing.” This collective vested interest in success has enabled the Council to take calculated risks, in terms of leaning on parties to comply with their Chapter 5 obligations, given that technically speaking, Chapter 5 falls outside the mission’s narrow mandate. It is also important to note one risk, however, of being labeled a success: a strong unanimous belief in success can also blind actors to setbacks and gaps. In this context, it is important for the Council to seek differing views and, where possible, travel to the region, as they did in this case.

2 ASSESS WHERE THE COUNCIL’S LEVERAGE LIES AND WHEN ITS INTERVENTION, VERSUS THAT OF OTHER PARTIES, WILL BE MOST IMPACTFUL

The Colombia case helpfully demonstrates the strategic and coordinated use of different actors to deliver tough messages around transitional justice and indicates the importance of understanding and then leveraging multiple parts within the system. Some messages the Council can relay more easily than its in-country counterparts. But other messages cannot be brought by the Council, given its make-up and the fact that it is, primarily, a political body. These
may be better shared bilaterally, by OHCHR or by third parties such as the ICC or the “New York Group” (in Phase I). This study helps demonstrate the importance of coordinating messages on the issue and only relying on the Council to deliver messages when it has a comparative advantage in doing so.

3 COUNCIL LEVERAGE IS MOST EFFECTIVE WHEN APPLIED TO A COLOMBIAN-OWNED AND LED PROCESS WITH STRONG LOCAL BUY-IN

Transitional justice, as a part of the final peace agreement, emerged organically in Colombia. Given this basis, it was easier for the Security Council to apply pressure at key moments on a country that already “owned” its process. Compare Colombia to a situation where no political elites inside a country are pushing for transitional justice measures or in which these measures were externally imposed. In this scenario, even a united Security Council would be unable to effectively pressure compliance with such measures. As the Council was reinforcing a genuinely Colombian-owned, Colombian-led transitional justice agenda, its words were more likely to reach domestic actors with the power to leverage them.

4 LANGUAGE MATTERS, BUT HOW ADVOCATES USE IT MATTERS MORE

In the case of Colombia, the Security Council expressed its support for transitional justice institutions primarily through press statements and meetings with leaders of those institutions during an official mission to the country. As described above, these statements were carefully crafted and timed so as to influence the parties without alienating them. Although such communications are less ‘blunt’ than Council resolutions or OHCHR’s reports to the Human Rights Council, they proved important in the case of Colombia, not only as written but because national and international actors leveraged them effectively. This is to be contrasted with the use of existing language in the Afghanistan case.

5 THE SECURITY COUNCIL AND ITS MISSION SHOULD TREAT PEACE AGREEMENT IMPLEMENTATION HOLISTICALLY

Even in cases where a mission has a narrow mandate, it is good practice for the mission to report back to the Council on progress toward implementation on an agreement as a whole, including its transitional justice elements. Doing so conveys to the parties that transitional justice is part of a comprehensive set of commitments. Simultaneously, in adopting a holistic approach to its statements on a peace process, the Council can help to signal to the parties that success in one area (such as DDR) is contingent on success in others (e.g. truth, justice and structural reform).

6 STRUCTURES SHOULD ENABLE, NOT LIMIT, COORDINATION

In the case of Colombia, the Government and the FARC-EP requested a specific role for the UN mission. The mission is, thus, a product of the negotiating parties’ request; it was not up to the UN bureaucracy to shape the mission as it saw fit. An integrated mission with a robust human rights/transitional justice mandate was therefore unrealistic in the case of Colombia and may be so in future cases. When dealing with a non-integrated mission, it is crucial to ensure that mission leadership is attuned to human rights and transitional justice prerogatives. It is also more important for the mission to seek inputs in their reporting on transitional justice from relevant sections of the UNCT, such as OHCHR. Arranging MOUs or other protocols offering guidance on collaboration may be helpful to ensure effective coordination between the mission and OHCHR and other elements of the country team supporting the transitional justice agenda. Moreover, it is also important to set the right incentives for field staff to cooperate and minimize duplication.
7 FRAME THE SECURITY COUNCIL’S ROLE AS AN INTERNATIONAL GUARANTOR OF NATIONAL AGREEMENTS, ONCE SIGNED

The Colombia case helps to demonstrate the role that the Council can play as a “protector of existing [national] peace agreements,” after the parties that signed the agreement have stepped down or moved on. There is a delicate balance, however, between protecting an agreement, which is nationally-led and nationally-owned, and respecting a country’s sovereign right to lead on the implementation of its own agreement. Thus far, the Council has achieved this delicate balance in Colombia, through the timing and scale of its involvement, the unique conditions of its involvement, the measured and context-sensitive approach of its critiques, the quality of the relationship it enjoys with the parties, and the eagerness of the Government to maintain a positive reputation in the international sphere.

8 EXPLORE OPTIONS FOR ADDING A TRANSITIONAL JUSTICE MONITORING ROLE INTO A FUTURE, REVISED MISSION MANDATE

The UN Verification Mission in Colombia’s mandate was renewed in September 2020. In light of the importance of continued success on Chapter 5 for the health of the full agreement, and in light of the combined vested interest of both the international community and the Government in maintaining Colombia as a success case, Council members and the Government should consider the possibility of slightly expanding the verification mandate to include verification of some aspects of the transitional justice architecture. The argument could be made to the Government that such international, third-party verification would assist in its efforts to encourage FARC members to comply with their obligations under the agreement and to keep the ICC at bay. But such a recommendation would also enable more robust verification of the army’s compliance, which, understandably, will be a harder sell. This is a developing situation since the completion of this paper.
This agreement was then put to a referendum on 2 October 2016, where it lost by a slim margin. Feedback was taken from those who voted against it and incorporated, through further negotiations, into a revised version. The revised version was then signed in a second, more discrete and low-key ceremony in November 2016. One of the revisions included limiting certain transitional justice provisions in the agreement to 10 years.

References

1 The four pillars include: truth, justice, reparations and non-repetition.
3 Source withheld.
4 Source withheld.
5 Source withheld.
7 This was in August 2015.
9 The parties did, however, ask Norway and Cuba to the play the role of guarantor countries and Chile and Venezuela to serve as “accompanying” countries to the process.
10 Segura and Mechoulan, Made in Havana: How. Colombia and the FARC Decided to End the War: 4.
11 Of the six subcommissions, this commission was both the most fraught and the corresponding chapter in the final Accord took the longest time to negotiate.
12 Segura and Mechoulan, Made in Havana: 17. According to this report: “The group began as an informal, confidential space to brainstorm possible solutions to the very difficult questions facing the negotiators on transitional justice.”
15 Source withheld.
16 Source withheld.
18 This agreement was then put to a referendum on 2 October 2016, where it lost by a slim margin. Feedback was taken from those who voted against it and incorporated, through further negotiations, into a revised version. The revised version was then signed in a second, more discrete and low-key ceremony in November 2016. One of the revisions included limiting certain transitional justice provisions in the agreement to 10 years.
19 Chapter 5: Agreement regarding the Victims of the Conflict: Comprehensive System for Truth, Justice, Reparations and Non-Recurrence", including the Special Jurisdiction for Peace; and Commitment on Human Rights, Final Agreement: 132.
20 Ibid.
23 Article 62. The Accord, however, states that the parties would request assistance from the UN, via the General Assembly, rather than the Security Council, a point of much debate.
24 Source withheld. See, Segura and Mechoulan. Made in Havana: 18 regarding the Government’s sensitivities around the referencing of Colombia as a fragile state.
26 Source withheld. To a great extent, this monitoring presence in Colombia was modeled after the UN Mission in Nepal (UNMIN), composed of unarmed, out-of-uniform, civilian monitors. This mission was also conceived as a “focused mission of limited duration.”
27 Source withheld.
28 One Council member suggested that Colombia picked the UK as a penholder as the UK approached the role ready to “listen hard to Colombia’s concerns.” In addition, they had neither a strong, formal pre-existing relationship with the parties or an agenda in the region.
31 The Colombian Parliament had already voted to weaken certain aspect of transitional justice in the Accord in early 2017, excluding “terceros” from the JEP.
33 Ibid.
34 Ibid.
One Council member explained: “All Council members realize that Colombia makes the Council look good. It is one of the only places where the whole agreement is still being discussed...and a place where the peace agreement has been protected” (source withheld).

Another noted the same for the Head of the UN Mission in Colombia (source withheld).


It is important to note that these elements had already come under threat with the 2016 plebiscite and then again in late 2016 - early 2017 with efforts to translate the Accord into national law.


Ibid.


In contrast, the Resident Coordinator was quite active during this period, in promoting prevention and transitional justice in particular. For an analysis of his efforts see: Cale Salih, “What Works in UN Resident Coordinator-led Conflict Prevention: Lessons from the Field, Colombia: 2012 - 2016”.

Phone interview, May 2020

Phone interview, May 2020. Colombia suggested that this mission could be done through the General Assembly. But in looking at the tasks the parties were asking the verification mission to carry out – in looking at how the mission would be structured and given its focus on peace and security (following the completion of the peace agreement), the feeling amongst those at UN Headquarters was generally that it would be much more appropriate to mandate it through the Council rather than the General Assembly.


Pro-peace agreement figures (including Sergio Jaramillo and Humberto de la Calle) and activists conveyed a letter to the Secretary-General pointing to the Council’s reiteration of the need to support the JEP’s independence and autonomy and calling on the UN Mission to take account of threats to JEP in its next report to UN Security Council: National Government Negotiating Team in the Peace Dialogues, “Letter dated 11 March 2018 to Antonio Guterres, Secretary General of the United Nations.” Justice for Colombia, accessed 22 September 2020, https://justiceforcolombia.org/news/letter-to-the-un-general-secretary-on-president-duque-jeps-objections/.


As one international observer in Colombia described, in this current political climate, “The Security Council is one of the only places where the whole agreement is still being discussed...and a place where the peace agreement has been protected” (source withheld).

It may also reflect a general tendency on the part of the Council to privilege support for judicial mechanisms over non-judicial mechanisms. Security Council Report, Consultation on the Security Council and Transitional Justice, 10 June 2020 [virtual].


E.g., “What is equally irrefutable is that peace faces serious obstacles to its consolidation. The greatest concern is the situation of insecurity in a number of areas in the countryside, where social leaders are being killed in alarming numbers; many former FARC-EP members have also fallen victim and the necessary presence of the State has yet to arrive. As this report also makes clear, the reintegration process has been slow to gain traction in many respects. Many former FARC-EP members remain deeply concerned about what they perceive as precarious legal, physical and economic conditions; I commend the perseverance of the vast majority who remain engaged in and firmly committed to the peace process. I regret that polarization around the peace process also continues. National reconciliation remains incipient despite the encouraging beginnings of the transitional justice system, whose autonomy must be respected.” United Nations Security Council, “United Nations Verification Mission in Colombia, Report of the Secretary-General,” United Nations, 26 December 2018, S/2018/1159.
E.g., “The detention of Mr. Hernández has caused considerable alarm among FARC members, particularly those in the territorial areas for training and reintegration. They are skeptical of the allegations and concerned that any other FARC member could be similarly charged. This case compounds the former FARC-EP members’ widespread sense of legal uncertainty that results from the continuing controversy over the transitional justice system.” United Nations Security Council, “United Nations Verification Mission in Colombia, Report of the Secretary-General,” United Nations, 20 July 2018, S/2018/723.

United Nations General Assembly, “Annual report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, United Nations, 23 March 2017, A/HRC/34/3/Add.3. For example, one concern highlighted in OHCHR’s reporting, but largely absent from the mission reporting, is the fact that “the expectations created by the Integrated System to reduce impunity for violations of human rights and international humanitarian law are undermined by the exclusion of non-military State agents and private individuals from the scope of mandatory application of the JEP.”

Ibid.


See, for example, President Juan Manuel Santos, “11th Annual Emilio Mignone Lecture on Transitional Justice,” Center for Human Rights and Global Justice, 4 March 2020, https://www.youtube.com/watch?v=xkojSgesxhE.

Source withheld.

Source withheld.

Source withheld.


Interview, UNVMC official, January 2020.

Interview, OHCHR official, January 2020.

In addition, the report notes that “this decision was primarily a practicality – for such a short mission duration, it made little sense to integrate the components only to disentangle them 12 months later.”: 14.

Rebecca Brubaker, Breaking the Mold: 16.

Source withheld.

At the time of drafting, JEP President Patricia Linares had just submitted a request to the Colombian President to broaden the UN Mission’s mandate. “La carta de la presidenta de la JEP al Presidente de la Republica,” Semena, 6 June 2020, https://www.semana.com/nacion/articulo/la-presidente-de-la-jep-le-pide-ayuda-a-duque/676668.